No. 210

In the Supreme Court of the United States

OCTOBER TERM, 1939

J. EARL MORGAN, EXECUTOR OF THE ESTATE OF ELIZABETH S. MORGAN, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

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OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 91–96) is reported in 36 B. T. A. 588. The opinion of the Circuit Court of Appeals (R. 112–122) is reported in 103 F. (2d) 636.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 22, 1939. (R. 124.) Petition for writ of certiorari was filed July 19, 1939. The

jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether certain powers of appointment exercised by the decedent by her last will were general powers of appointment within the meaning of Section 302 (f) of the Revenue Act of 1926, as amended.

STATUTE AND REGULATIONS INVOLVED

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended by Sec. 803 (b) of the Revenue Act of 1932, c. 209, 47 Stat. 169:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (f) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * * except in case of a bona fide sale for an adequate and full consideration in money or money's worth; * * *. (U. S. C. Title 26, Sec. 411.)
>
> * * * * *

Treasury Regulations 80 (1934 Ed.):

> ART. 24. *Property passing under general power of appointment.*—The value of all property passing under a general power of appointment must be included in the gross estate of the person exercising the power (known as the donee, or appointor) if the power is exercised by will and such donee dies after the enactment of the Revenue Act of 1918. * * *
>
> Only property passing under a general power should be included. Ordinarily a general power is one to appoint to any person or persons in the discretion of the donee of the power. If the donee is required to appoint to a specified person or class of persons, the property should not be included in his gross estate. * * *

STATEMENT

The facts as stipulated (R. 75–78) and as found by the Board (R. 91–93), may be summarized as follows:

The decedent, Elizabeth S. Morgan, died testate on May 3, 1933, a resident of the State of Wisconsin, and petitioner is the duly appointed executor of her last will and testament. Isaac Stephenson, decedent's father, died testate on March 15, 1918, likewise a resident of the State of Wisconsin. By his last will and testament and several codicils thereto, he conveyed certain property in trust for the benefit of his children. The

children were to receive the income annually and a certain portion of the principal at the end of four, eight, and twelve years after his death, and the entire remaining principal at the end of sixteen years after his death, provided they were living at the end of each of the four stated periods. (R. 91–92.) The trust estate was divided into nine parts, part numbered five being conveyed in trust for decedent's benefit pursuant to the following provisions (R. 92):

> Item Fifteen: I direct said trustees to pay to my daughter Elizabeth S. Morgan annually the net annual income from part numbered five (5) into which my trustees shall have divided my estate * * *.
>
> I give, devise and bequeath to the appointee or appointees of my daughter Elizabeth S. Morgan by her last will and testament all property of any nature and kind in the hands of my said trustees at the time of her death constituting said part five (5) * * *.

The trust further provided that, should decedent die without exercising the power, then whatever portion of the principal remained should go to her issue, and, in the event of her death without issue, then such remaining portion of the principal should be equally divided and distributed among the other remaining parts into which the estate was divided. (R. 92.)

Shortly before his death Isaac Stephenson executed a deed of trust to continue for 21 years after his death. The trust property subject to this deed of trust was also divided into parts and one part allocated to each beneficiary. (R. 113.) The following provisions of the deed of trust related to decedent (R. 18–19, 92–93):

> 7. After my death and during the continuance of the trust hereby created, said Trustees shall pay annually to my daughter Elizabeth S. Morgan the net annual income from said part numbered five (5).
>
> If my daughter Elizabeth S. Morgan shall be living at the time of the termination of this trust, said Trustees shall transfer to her all property then in their possession constituting said part five (5).
>
> If my daughter Elizabeth S. Morgan should die prior to the termination of said trust, then said Trustees shall pay annually the net annual income from said part five (5) to such person or persons as she may appoint by her last will and testament duly admitted to probate, and at the termination of this trust said Trustees shall transfer the property then in their possession constituting said part five (5) to such person or persons as she may appoint in the manner aforesaid.
>
> If my daughter Elizabeth S. Morgan, dying as aforesaid, should fail to make such appointment * * * then and in any

> such event the annual income from said part five (5), * * * shall be paid annually by said Trustees to her issue surviving * * * and at the termination of said trust, said Trustees shall transfer all the property then in their possession, constituting said part five (5), * * * to the then surviving issue of my said daughter, * * *.

During her life, decedent received the distributions payable to her at the end of the fourth, eighth, and twelfth years after the death of her father, as provided for in his will, but she did not receive the distribution payable to her at the end of the sixteenth year because of her prior death. (R. 93.)

By her last will and testament, decedent exercised the power of appointment under her father's will as to that portion of the property which she would have received at the end of the sixteenth year after her father's death, had she lived, and she also exercised the power of appointment given her by her father's deed of trust, the appointments being in the following words (R. 93):

> Twenty-Second: Under the last will and testament of my father * * * I do hereby nominate, constitute, authorize and appoint my husband, J. Earl Morgan * * *.
>
> Twenty-Third: Under the Deed of Trust dated May 12, 1917, * * * I do

hereby appoint my husband, J. Earl Morgan * * *.

The Commissioner of Internal Revenue determined that both powers which decedent exercised by will were "general" powers of appointment; and that the value of the property passing under the powers should be included in decedent's gross estate under Section 302 (f) of the Revenue Act of 1926, as amended by Section 803 (b) of the Revenue Act of 1932. The Board of Tax Appeals approved the Commissioner's action (R. 91–96), and the court below affirmed (R. 124).

ARGUMENT

The term "general power of appointment," as used in the Revenue Act, has consistently been construed to mean the power to appoint to any person or persons in the discretion of the donee of the power. *Lee* v. *Commissioner,* 57 F. (2d) 399 (App. D. C.), certiorari denied, 286 U. S. 563; *Leser* v. *Burnet,* 46 F. (2d) 756 (C. C. A. 4th); *Blackburne* v. *Brown,* 43 F. (2d) 320 (C. C. A. 3d); *Fidelity-Philadelphia Trust Co.* v. *McCaughn,* 34 F. (2d) 600 (C. C. A. 3d), certiorari denied, 280 U. S. 602; *Whitlock-Rose* v. *McCaughn,* 21 F. (2d) 164 (C. C. A. 3d); Treasury Regulations 80, Art. 24.[1] Under this test the Circuit Court of Appeals

[1] The Revenue Act does not define "general powers of appointment." However, in the 1919 revised edition of Treasury Regulations 37 a general power is defined in Article 30 as "one to appoint to any person or persons in the discretion of the donee." Substantially the same definition

was clearly correct in its conclusion that the powers vested in the decedent were "general" powers and that, therefore, the property passing pursuant to decedent's exercise of those powers was taxable under Section 302 (f) of the Revenue Act of 1926, as amended.

Petitioner does not deny that, apart from certain veto powers vested in the trustees which are referred to below, the will and deed of trust gave the decedent power to appoint to any person or persons in her sole discretion, but contends that the determination of whether such a power is "general" or "special" within the meaning of the Revenue Act depends upon the manner in which such a power is characterized under Wisconsin law, rather than upon the interpretation which the federal courts have given to the Federal tax statute. Petitioner urges that under the provisions of a Wisconsin statute, set forth in the margin,[2]

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has been contained in all later regulations, the only change being the addition of the word "ordinarily" in the 1924 and subsequent regulations. The repeated reenactment of the provisions first contained in the Revenue Act of 1918, relating to property passing under a general power of appointment, in the light of the administrative definition of a general power, shows that Congress adopted the administrative construction. *McFeely* v. *Commissioner*, 296 U. S. 102, 108; *Morrissey* v. *Commissioner*, 296 U. S. 344, 355.

[2] Statutes of Wisconsin, 1937, Sec. 232.05. "*General Power.* A power is general when it authorizes the alienation in fee, by means of a conveyance, will, or charge of the lands embraced in the power, to any alienee whatever."

232.06. "*Special Power.* A power is special: (1) When the person or class of persons to whom the disposition of the

and a casual reference thereto in *Cawker* v. *Dreutzer*, 197 Wis. 98, 135, the power vested in the decedent would be characterized as "special" by the Wisconsin courts.

The court below found it unnecessary to decide whether, under Wisconsin law, the power vested in decedent would be deemed general or special. It held that, under Wisconsin law, the language of the grant of power vested in the decedent unlimited power to appoint to any person or persons, and concluded that "such a power satisfies the definition of a general power as that term is used in Section 302 (f), even though it is characterized as a special power under statutory provisions in Wisconsin" (R. 116).

1. The decision of the court below is in entire accord with the decisions in *Leser* v. *Burnet, supra,* and *Whitlock-Rose* v. *McCaughn, supra,* with which petitioner asserts it to be in conflict. In *Leser* v. *Burnet,* which likewise involved a transfer of property passing under the exercise of a power of appointment, the court first determined, independently of any local statute or court decision, the meaning of "general power" as used in the Revenue Act and held that such a power is "one which may be exercised by the donee of the

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lands under the power to be made are designated. (2) When the power authorizes the alienation by means of a conveyance, will, or charge of a particular estate or interest less than a fee."

power in favor of any person whomsoever including the donee himself or his own creditors" (46 F. (2d) at 758). The court then said that it was necessary to determine whether the particular power involved was "a general power within this meaning of the act of Congress" and stated that this was to be determined by the law of Maryland (p. 760). Since, under Maryland law, the power in question could not be exercised in favor of the donee's creditors, the court concluded that it did not come "within the meaning of a general power of appointment as that term is used in the language of the revenue act" (p. 761). Thus the same approach was used in the *Leser* case as in the case at bar: state laws were examined to determine the precise scope of the power created by the language in the grant and, this having been determined, the question of whether a power of such scope came within the definition of a general power for purposes of the Revenue Act was decided as a matter of federal law.

Whitlock-Rose v. *McCaughn, supra,* enunciates the same principle. The question there involved was whether a power of appointment exercisable only by will was a general power within the meaning of the Revenue Act. The court, interpreting the Act to cover any power in which there was no restriction as to appointees, even though there was a restriction as to the method of appointment, held the power there involved to be general because under state law the donee of such a power was sub-

ject to no limitations in the choice of his appointees and the property subject to the power was subject to the donee's debts.[*]

The Wisconsin statute upon which petitioner relies in the present case to change an otherwise general power into a special power in no way restricts the donee's selection of appointees; it provides merely that a power authorizing the alienation of an estate or interest less than a fee shall be deemed special. While we do not concede that the estate here involved was less than a fee within the meaning of that statute, it seems entirely clear that the statute could not in any event affect the operation of the federal taxing act. The tax here is not on property but on the privilege enjoyed by the decedent in the exercise of a power. *Stratton* v. *United States*, 50 F. (2d) 48 (C. C. A. 1st), certiorari denied, 284 U. S. 651. The Revenue Act is obviously concerned with the latitude of the power rather than with the quantum of the

[*] The court's statement in the *Whitlock-Rose* opinion that "The law of New Jersey controls this case," when read in its context in the opinion as a whole, obviously refers only to the state law with respect to the scope of the power. If this were not otherwise perfectly clear, it is made so by the subsequent decisions of the same court in *Fidelity-Philadelphia Trust Co.* v. *McCaughn*, *supra*, and *Blackburne* v. *Brown*, *supra*, holding, in accord with the decision of the court below in the present case, that the meaning which state law attributes to the term "general power of appointment" is not binding upon the federal courts in construing those words in the Revenue Acts.

estate passed pursuant to its exercise, for the tax is imposed upon "any property" passing under a general power of appointment. There is no basis for reading into the statute the qualification that the property must be a fee simple estate. Consequently it is immaterial that, under the Wisconsin law, the power here involved might possibly be classified as "special" because it might be held to authorize the alienation of less than a fee. See Griswold, *Powers of Appointment and the Federal Estate Tax*, 52 Harv. L. Rev. 929, 942.

2. The decision below is not in conflict, as petitioner contends (Pet. 10, 20–25), with the decisions of this Court in *Lang* v. *Commissioner*, 304 U. S. 264; *Sharp* v. *Commissioner*, 303 U. S. 624; *Blair* v. *Commissioner*, 300 U. S. 5; *Freuler* v. *Helvering*, 291 U. S. 35; or *Poe* v. *Seaborn*, 282 U. S. 101. Those cases merely hold that state law is controlling in determining the nature of the legal interest which the taxpayer had in the property or income subject to taxation. They do not hold that, after the nature of such interest is established, state law controls in determining whether such interest comes within the terms of the Revenue Act.

As pointed out in *Burnet* v. *Harmel*, 287 U. S. 103, state law creates legal interests but the federal law determines when and how they shall be taxed. There this Court held that a Texas gas and oil lease, which under Texas law was classified as a sale, was

not the type of transaction constituting a sale within the contemplation of the federal statute taxing capital gains. More recently, in *Lyeth* v. *Hoey*, 305 U. S. 188, a case dealing with the federal estate tax, this Court recognized that the taxpayer's status as an heir was to be determined by state law but that when, pursuant to a compromise agreement among the heirs, a distribution was made, the question whether the property so received was "acquired by inheritance" within the meaning of the federal taxing statute was necessarily a federal question.

3. While not asserted as a reason for granting the writ, the further contention is made in the brief supporting the petition (Br. 33) that the will and trust deed must be construed as vesting a veto power in the trustees over any appointment made by the donee of the power. This contention was rejected by the court below after full consideration (R. 118–122) and its decision in this respect presents no conflict but involves merely the construction of the particular instruments here involved. Accordingly, it furnishes no basis for the issuance of the writ.

4. The additional contention is stated but not argued (Br. 46) that the Revenue Act as applied to this case is invalid because retroactive, the power of appointment having been given prior to the first enactment of the tax. This contention is unten-

able. The statute may be applied if the power is exercised after the date of enactment. *Lee* v. *Commissioner, supra.*[*]

CONCLUSION

There is no conflict of authority. The decision below is in accord with the applicable decisions of this Court. The petition should be denied.

Respectfully submitted.

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AUGUST, 1939.

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[*] Disapproved only as to another point in *Helvering* v. *Grinnell*, 294 U. S. 153.